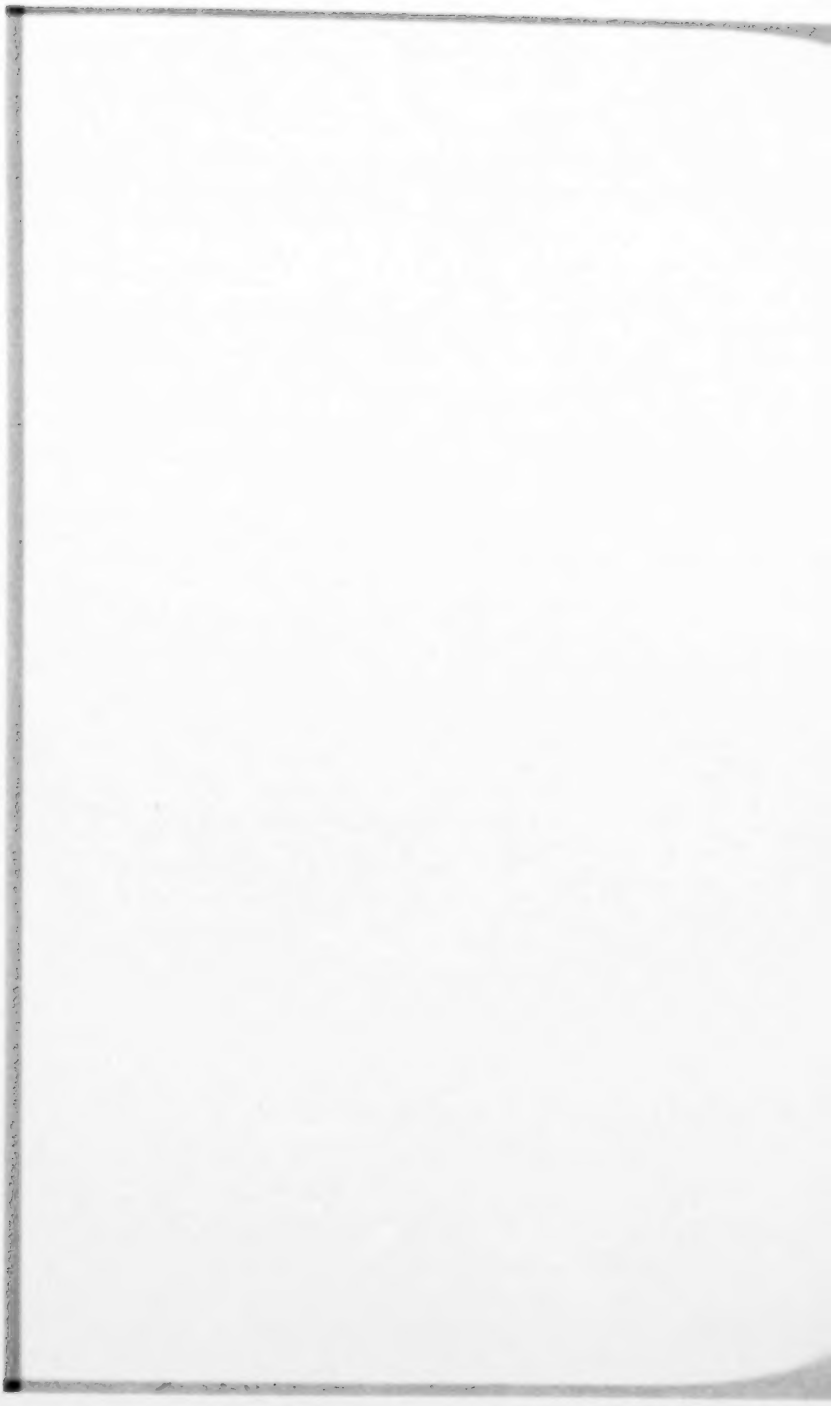

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 80

EDWARD J. KEENAN,

vs. *Petitioner,*

C. J. BURKE, WARDEN,

Respondent

No. 81

WALTER JANKOWSKI,

vs. *Petitioner,*

C. J. BURKE, WARDEN,

Respondent

No. 82

ORVILLE FOULKE,

vs. *Petitioner,*

C. J. BURKE, WARDEN,

Respondent

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR PETITIONERS

ARCHIBALD COX,
Counsel for Petitioners.

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BRIEF FOR PETITIONERS

Opinion Below

The Supreme Court of Pennsylvania did not deliver an opinion in these cases at the time its judgments were entered. Later, after this Court had granted certiorari, the court filed a short *per curiam* opinion which appears R. 75-78 but has not been reported.

Jurisdiction

The petition for *habeas corpus* in each of these cases challenged the petitioner's confinement in the Eastern State

Penitentiary as a deprivation of liberty without due process of law. The essential contention in each petition was that through lack of counsel for the accused, the proceedings did not conform to fundamental standards of decency and fair play. Under Pennsylvania law this federal question was properly raised by *habeas corpus*. *Commonwealth ex rel. Schultz* v. *Smith*, 139 Pa. Super. 357, cited with approval in *Commonwealth ex rel. Penland* v. *Ashe*, 341 Pa. 337, 341-342; see also *Townsend* v. *Burke*, 334 U. S. 736; *Uveges* v. *Pennsylvania*, 335 U. S. 437. The opinion below plainly reveals that the court did in fact rule on the question and that its decision does not rest on a non-federal ground (R. 75-78).

The judgments denying the petitions for writs of *habeas corpus* were entered on February 15, 1951 (R. 20, 60, 67). In No. 80 the motion for leave to proceed *in forma pauperis* and the petition for certiorari were filed on March 10, 1951. In Nos. 81 and 82 the same papers were filed on March 21, 1951. The motions were granted and certiorari was allowed in all three cases on May 28, 1951 (R. 78-79).

The jurisdiction of this Court is based upon U. S. Code Title 28, Sec. 1257(3).

Question Presented

Whether the carelessness and facetiousness of the trial court in conducting the proceedings in which petitioners were sentenced to long terms of imprisonment in the absence of counsel rendered the hearing so apt to result in injustice as to be fundamentally unfair.

Statement

These cases arise on petitions for writs of *habeas corpus* filed in the Supreme Court of Pennsylvania. The facts

summarized below are either alleged in the petitions (R. 12-20, 60-62, 68-70) and not denied by the responses of the warden and district attorney (R. 20-23, 63-66, 71-74); or else they appear in the transcript of the proceeding before the sentencing court (R. 7-10).

On May 17, 1945, petitioner Keenan was arrested by the Philadelphia police and taken to the headquarters of the 1st Detective Division. From nine in the evening until the early hours of the morning he was questioned continuously by relays of detectives without food or rest; and then he "was held incommunicado for approximately three days and was not allowed to see anyone until after he had signed a statement prepared by the detectives" (R. 17). When he signed the statement Keenan "was in such a mental and physical state that he was willing to sign a statement confessing to anything just so long as the brutal treatment that he had been receiving all this time would stop" (R. 17). Even after he had been committed to the county prison to await trial, Keenan was constantly placed in police line-ups and constantly told, contrary to fact, that he had been identified by witnesses. Since Keenan "was never identified by anyone" (R. 17), it may be inferred that this was the police method of inducing Keenan to believe that he should plead guilty because he could not hope to establish his innocence.

On June 5, 1945, Keenan was arraigned on five indictments in the Court of Quarter Sessions. Five other defendants accused of the same or related crimes were arraigned at the same time (R. 1). One was Frank Townsend whose sentence this Court subsequently set aside in *Townsend* v. *Burke*, 334 U. S. 736. Two of the other defendants were Walter Jankowski and Orville Foulke, the petitioners in Nos. 81 and 82. Like Townsend, the present petitioners pleaded "Guilty" to some indictments and "Not Guilty" to

others.[1] After hearing a detective give a cursory account of the crimes to which defendants pleaded guilty, the court turned to the question of sentence. None of the petitioners had the benefit of counsel. The record does not show that they were aware of their rights.

Townsend was sentenced first. The judge read what purported to be Townsend's criminal record. As read, it contained two errors (R. 7-8). The judge then noted that one of the previous charges had been receiving stolen goods—a saxophone—and remarked (R. 8):

> "What did you want with a saxophone? Didn't hope to play in the prison band then, did you?
> "The Court: Ten to twenty in the Penitentiary."

This Court later set aside Townsend's sentence because its pronouncement on a foundation so extensively and materially false, which petitioner had no opportunity to correct by the assistance of counsel, voided the proceedings as lacking in due process of law. *Townsend* v. *Burke*, 334 U. S. 736.

Petitioner Keenan was called next. The judge recited what purported to be Keenan's record (R. 8):

> "Larceny of automobile back in 1937. Again in 1937, suspicion of larceny of a Yellow Cab. Judge Crumlish gave you a chance, put you on probation the first time. 1930, larceny of an automobile.
> "1938, larceny of an automobile.

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[1] Keenan pleaded guilty to indictments Nos. 696, 698, 699, 701, 703, 704, 705, 708 and 710, May Sessions, 1945, and not guilty to Nos. 697, 700, 711, May Sessions, 1945.

Jankowski pleaded guilty on indictments Nos. 698, 699 and 704, May Sessions, 1945, and not guilty on indictments Nos. 704 and No. 706, May Sessions, 1945.

Foulke pleaded guilty to indictments Nos. 698 and 699, May Sessions, 1945, and not guilty to indictments Nos. 697, 700 and 707, May Sessions, 1945.

"1943, larceny of a revolver. Aggravated assault and battery.

"1945, April, attempted burgulary. That is this one.

"The Court: Well, if you want to be gunmen you better get out of Philadelphia. This isn't very happy hunting ground for you. Ten to twenty."

Again, the court's sneering remarks were accompanied by errors. Keenan was ten years old in 1930 and could scarcely have stolen an automobile (R. 14).[2] The charge of larceny of a Yellow Cab had been dismissed (R. 14, 24). The April 1945 indictment for attempted burglary was not the charge before the court; indeed, petitioner had pleaded "Not Guilty" to that indictment and had not been tried (R. 13, 24).

The third defendant to be sentenced was Cain. He is not involved in this proceeding but it should be noted that in his case too the judge prefaced the passing of sentence with a gibe (R. 8).

Petitioner Foulke was sentenced immediately after Cain. The court read a record of what purported to be three offenses (R. 9). As to two of them his reading was inaccurate or incomplete. Foulke was discharged from the accusation of being a frequenter of a disorderly taproom (R. 74). The 1942 charge of assault and battery, resisting arrest was *nol prossed* (R. 74). Immediately after this inaccurate recital the court sentenced Foulke to a term of from seven and a half to fifteen years in the penitentiary.

Petitioner Jankowski was the next to be sentenced. The judge read a list of five offenses; all of them were petty and had occurred while Jankowski was 14 or 15 years old. The record reveals that on two out of the five charges

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[2] It is possible that in this instance the apparent error was the result of a mistake by the court reporter. See p. 11, *infra*.

Jankowski had actually been discharged by the magistrate (R. 66), but once again the sentencing judge apparently did not know or did not care about their true disposition. One offense was stealing candy. With the gibe "Do you like candy?" Jankowski was sentenced to a term of from seven and a half to fifteen years imprisonment (R. 9).

The last defendant (not a petitioner here) was Joseph Kopitsko. He alone was represented by counsel. As soon as counsel said a word in his behalf, the court stated (R. 9):

> "I am not disposing of him today for reasons I don't care to divulge right now."

Kopitsko was sentenced ten days later to a term of from two and a half to five years (R. 10).

Petitioners were committed to the Eastern State Penitentiary under the sentences thus passed. On October 3 and 4, 1950, they filed original petitions for *habeas corpus* in the Supreme Court of Pennsylvania (R. 12-20, 60-62, 68-70). On February 15, 1951, the petitions were denied (R. 11, 60, 67).

Specification of Errors to Be Urged

In each of these three cases the Supreme Court of Pennsylvania erred:

1. In failing to hold that under the circumstances set forth in the petition for *habeas corpus* and revealed by the record, the gravity of the crime and the conduct of the court and prosecuting officials rendered the proceedings, in which petitioner lacked the assistance of counsel, so apt to result in injustice as to deny due process of law.

2. In failing to hold that under the circumstances set forth in the petition for *habeas corpus* and revealed by the record, the petitioner was constitutionally entitled to the assistance of counsel.

3. In denying the petition for *habeas corpus*.

Summary of Argument

Petitioners' cases are governed by the ruling on the petition of their co-defendant, Townsend. *Townsend* v. *Burke*, 334 U. S. 736. Townsend's sentence was held void because the sentencing court, through indifference or design, had passed judgment on the basis of a reading of Townsend's criminal record which contained within short compass three serious mistakes of fact. On a record thus savoring "of foul play or of carelessness" (334 U. S. at 740), the Court would not assume that the mistakes did not influence the heavy sentence imposed.

Petitioners come before the Court on the same record. They were co-defendants with Townsend and were sentenced in the same proceeding. The mistakes and sarcastic facetiousness which led the Court to set aside Townsend's sentence were repeated during the imposition of sentence on each of the three petitioners. Like Townsend, Keenan and Jankowski were sentenced to long terms of imprisonment with a sneering gibe. At least two items recited against Keenan were inaccurate in material respects. On two of the three charges read off against Foulke, he had actually been discharged. On two charges read off against Jankowski, Jankowski had not been found guilty.

On a plea of guilty not every mistake in resolving a question of fact in the absence of counsel necessarily indicates a want of due process. The decisive question is whether there has been "a scrupulous and diligent search for truth" (334 U. S. at 741). In these cases the proceedings in the sentencing court were marked by carelessness if not indifference toward truth and deliberate justice. Since this fatal defect permeated the record, petitioners' sentences are void even though they are unable to prove that the presence of counsel would have changed the outcome. At the very least counsel "could have taken steps to see that the con-

viction and sentence were not based on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from the petitioner[s]" (*ibid.*).

ARGUMENT

I

The proceeding in which petitioners were convicted and sentenced without the assistance of counsel was conducted with such carelessness, if not callous indifference to truth and deliberate justice, as to deny due process of law.

The "due process of law" which the Fourteenth Amendment guarantees to every person charged with crime requires this Court, when its jurisdiction is properly invoked, to review the whole course of the criminal proceedings to ascertain whether they violated any "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Palko* v. *Connecticut*, 302 U. S. 319, 325). Application of the standard in concrete cases inevitably produces differences, but neither majority nor dissenting opinion has ever softened the Court's rigid insistence that a sentence imposed without "the substance of a hearing" is a denial of due process.

A hearing is a sham when the accused cannot meet the charge because he cannot comprehend it or cannot intelligently manage his defense. A State is under an obligation to take some measure appropriate to the circumstances of the case to ensure that the defendant understands the charge and has a fair opportunity to prepare and present his answer. The extent of the State's obligation to offer the assistance of counsel in order to satisfy this obligation has been the subject of such careful consideration during several recent terms of Court as to make further analysis inappropriate here. In *Uveges* v. *Pennsylvania*, 335 U. S. 437,

441, Mr. Justice Reed summarized the view held by a majority of the justices:

> Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group holds that the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not.

Petitioners' contention is that the conduct of the court or prosecuting officials, while they were being sentenced to long terms of imprisonment on serious charges, was marked by such carelessness or foul play as to render the passing of sentence in the absence of counsel "so apt to result in injustice as to be fundamentally unfair." The rule invoked by petitioners was established by the decision in *Townsend* v. *Burke*, 334 U. S. 376. Townsend was a co-defendant with petitioners and was sentenced in the very same proceeding that they now challenge. The Court held that Townsend's sentence was void because Townsend, who lacked the assistance of counsel, was either overreached by the prosecution's submission of misinformation or prejudiced by the judge's misreading of court records. The only question now to be decided is whether the same carelessness or foul play was repeated in sentencing the three co-defendants who are presently before the Court. It is submitted that the record clearly bears out petitioners' contention that a lack of fair play permeated the entire proceeding.

As set forth in the Statement above (pp. 2-6) Townsend, the three petitioners and two other defendants were arraigned together on a number of indictments charging them with robbery, burglary and other serious crimes.

Immediately after they pleaded guilty to several indictments, they were called for sentencing. Townsend was the first to be sentenced. The court recited what purported to be his criminal record. Then the following occurred (R. 8):

> "Q. 1937, receiving stolen goods, a saxophone. What did you want with a saxophone? Didn't hope to play in the prison band then, did you?
> "The Court: Ten to twenty in the Penitentiary."

In voiding Townsend's conviction this Court remarked that "The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two others of the charges which the court recited against the defendant, he had also been found not guilty. * * * while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." 334 U. S. at 740-741.

The atmosphere "of foul play or of carelessness" that poisoned the sentencing of Townsend continued throughout the proceeding. The record shows beyond doubt that in sentencing all the remaining defendants, save one, the court made repeated mistakes and similar gibes at the expense of the accused. The one exception was Kopitsko (not a petitioner), who alone was represented by counsel.

Petitioner Keenan was called next after Townsend. The judge read from his record (R. 8):

"Larceny of automobile back in 1937. Again in 1937, suspicion of larceny of a Yellow Cab. Judge Crumlish gave you a chance, put you on probation the first time. 1930, larceny of an automobile.

"1938, larceny of an automobile.

"1943, larceny of a revolver. Aggravated assault and battery.

"1945, April, attempted burglary. That is this one.

"The Court: Well, if you want to be gunmen you better get out of Philadelphia. This isn't a very happy hunting ground for you. Ten to twenty."

As in Townsend's case, the court's mistakes of fact, resulting from carelessness or misinformation, show the unfairness of the proceeding. The charge "1930, larceny of an automobile" is obviously wrong. The petition for *habeas corpus* (R. 14) shows that Keenan was 10 years old in 1930 and no offense prior to 1937 is listed in his criminal record (R. 24). Even though this apparent error on the part of the judge be attributed to a mistake by the court stenographer,[3] there were two other undeniable mistakes in the recital of Keenan's record. First, he had not been convicted on the 1937 charge of larceny of a Yellow Cab, which the judge read in passing sentence. The petition for *habeas corpus* alleges that the charge was dismissed and the petitioner found not guilty (R. 14). Respondents did not deny the allegation. The police record shows an arrest but no conviction (R. 13, 24). Second, the trial judge erred in taking into account the attempted burglary charged by indictment No. 300, April Term, 1945. It is not wholly clear whether the court thought that this was the indictment on

[3] The warden's return shows that Keenan's record apparently included two convictions for larceny of an automobile in 1938 (R. 24). Since the 1930 item appearing in the printed transcript comes at a point where it would naturally correspond with one of these convictions, there is the possibility that it was not the trial judge but the court stenographer who was at fault.

which Keenan was to be sentenced or read it as part of Keenan's criminal record. If the court's next remark "That is this one" (R. 8) refers to the charge of attempted burglary, it reveals the carelessness with which the entire proceeding was conducted. Keenan was not being sentenced on the April indictment. If it refers to another item—to a charge on which Keenan was before the court—then the preceding reference to the attempted burglary charge as if it were a conviction was highly prejudicial. For Keenan had pleaded not guilty to the April indictment and had not yet been tried (R. 24).

In an opinion filed after Keenan's petition for certiorari had been granted, the Supreme Court of Pennsylvania characterized the judge's remarks as "hardly * * * more than an exhibition of overzealous local civic pride" and stated that the reference to indictment No. 300 "is the only item attacked by him and it was at least an actually pending charge against him for which he was then under arrest and to which he subsequently pleaded guilty" (R. 77). The assertion is mistaken on two counts. As a matter of fact Keenan attacked other items: the 1930 charge of larceny of an automobile, an obvious error, and the 1937 charge of suspicion of larceny of a Yellow Cab, which was read without mention of its dismissal (R. 13, 14). As a matter of law, the subsequent conviction on indictment No. 300 could not retroactively remove the unfairness of treating a mere accusation as if it were a previous offense. Nor should the mistakes and the judge's remarks be read in isolation. The attitude which they reveal is to be determined by the somber reflection cast on the fairness of the proceeding by the court's facetiousness in sentencing Townsend and by the mistakes and gibes revealed by the transcript of the colloquies between the court and the other defendants.

Cain, who is not now a petitioner in this Court, was sentenced next. As he passed sentence the judge said (R. 8):

> "Q. You want to be a big timer too, don't you?
> "A. No.
> "The Court: Ten to twenty."

The Court next addressed petitioner Foulke (R. 8-9):

> "Q. How many of these crimes were you in on?
> "A. One.
> "Q. How many times have you been here before?
> "A. Once.
> "Q. Frequenter of a disorderly taproom in 1939.
> "Assault and battery by fist in 1940.
> "Assault and battery, resisting arrest, in 1942.
> And this."

Actually Foulke was not guilty of two of the three offenses taken into account in passing sentence. He was discharged by the magistrate after his arrest in 1939 (R. 74). A *nol. pros.* had been entered on the charge of assault and battery, resisting arrest in 1942 (R. 74). Nevertheless the court ignored Foulke's futile statement that he had been tried only once; the judge read off the unproved charges as if they were prior convictions. The case is squarely within the decision in *Townsend* v. *Burke*. "We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the petitioner is now serving." 334 U. S. at 740.

Jankowski was sentenced next. The court read a record of five offenses, the earliest in 1935 when Jankowski was 14 and the last in 1937 when he was 16. All had occurred 8 years before. All were petty in character. In this instance again, the court indulged in a facetious remark at the expense of the accused. One item read from the record was larceny of candy from a cigar store while the accused was a boy. The judge punctuated his recital of the record

with the question "Do you like candy?" (R. 9). In a transcript of two printed pages marked by three gibes at other defendants and seven inaccuracies in reading their criminal records, the irrelevant question "Do you like candy?" would be enough to cast doubt upon the fairness of the treatment accorded to Jankowski. The unjudicial character of the hearing becomes undeniable when we learn from the record that the charge which led to this derision had actually been dismissed by the magistrate (R. 66) and that Jankowski had also been discharged on another of the charges which the court recited against him (*ibid*).

In dismissing the petitions for *habeas corpus* filed by Foulke and Jankowski the Supreme Court of Pennsylvania did not take note of the errors made by the sentencing court (R. 76-77), perhaps because the petitioners, who were still without counsel, did not point out the errors (R. 60-62, 68-70). Respondent may argue, however, that petitioners were not prejudiced by the mistakes made by the sentencing court in the absence of counsel because they were not so numerous or important as the errors made in sentencing Townsend. Actually the record suggests that the presence of counsel might well have influenced the treatment accorded petitioners. There were six defendants in the original proceeding. Townsend, Cain and Keenan were given indeterminate sentences, the minimum ten years (R. 8). Foulke and Jankowski were sentenced to minimum terms of seven and a half years (R. 9). None of them were represented by counsel. The sixth defendant was Joseph Kopitsko. He was named in more indictments than any other defendant (R. 1); he pleaded guilty to at least as many serious offenses. According to the detective's testimony he played a major part in the crimes (R. 2-4). His criminal record does not appear; but since it included a term of two and a half years in the State Penitentiary, it was certainly more

serious than the single charge of assault and battery on which Foulke had previously been found guilty or the petty boyhood thievery committed by Jankowski. Nevertheless, when Kopitsko was called, the court postponed sentence "for reasons I don't care to divulge right now." Later the court imposed a minimum sentence of two and a half years imprisonment (R. 9-10). This was one-third the length of the sentence imposed on Foulke and Jankowski, one-fourth the sentence meted out to Townsend, Keenan and Cain. There were no mistakes or gibes in sentencing Kopitsko. Kopitsko had counsel.

Despite the startling contrast it must be conceded that the more favorable treatment accorded the only prisoner who had counsel could have resulted from other factors not revealed by a printed record. The complete answer to the argument that the petitioners failed to prove substantial prejudice was stated by Mr. Justice Jackson in *Townsend* v. *Burke*: "We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the petitioner is now serving. * * * [C]ounsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner." 334 U. S. at 740-741.

It would be equally improper to separate the sentencing of each defendant into an isolated compartment and then to engage in nice calculations as to whether the foundation on which each sentence was pronounced was as "extensively and materially false" as in Townsend's case. No one can say whether the three mistakes made in reciting seven or eight previous charges against Townsend were more or less important than the two errors made in reciting three prior

charges against Foulke. The two mistakes made in sentencing Jankowski cannot be measured by any standard of comparison against the confusion revealed in the transcript of the colloquy preceding the pronouncement of Keenan's sentence. But even if a logical distinction could be drawn between Townsend's case and one or more of the present petitions, the Court should not give weight to the refinement. Obedience to law depends upon the law's ability to command respect as a means of securing fair and equal justice. There are branches of the law in which distinctions must be drawn unintelligible to the untutored layman, but they are not appropriate in dealing with four co-defendants who lacked the assistance of counsel and challenge the fairness of the hearing. Cf. *Glasser* v. *United States*, 315 U. S. 60, 75-76.

This is not to say that a prisoner can have his conviction set aside under the Fourteenth Amendment merely because a co-defendant lacked the assistance of counsel under circumstances amounting to a denial of due process. Cf. *Glasser* v. *United States*, 315 U. S. 60, 76-77. Each of the petitioners lacked the assistance of counsel. Each was sentenced to a long term of imprisonment on the basis of mistakes concerning his prior record. The decisive question is whether these errors occurred despite "a scrupulous and diligent search for truth" or furnish evidence that the proceeding bore such marks "of foul play or of carelessness" as to lack the substance of a hearing. (*Townsend* v. *Burke*, 334 U. S. 736, 740, 741.) On this point it is proper to be read the record whole. A fair prosecutor and a conscientious judge might be mistaken on one or two items even in a short record. A single facetious remark in a proceeding otherwise unmarred by impropriety may be dismissed as bad taste. But when four gibes at the accused and nine mistakes concerning their previous criminal records are

found within a transcript of two printed pages, it becomes apparent that the prisoners, lacking the assistance of counsel, were denied the substance of a hearing.

The conduct of the court towards the accused has special importance when the accused has no counsel to protect his interests. Under the English practice which lies beneath the colonial laws relied upon in *Betts* v. *Brady*, 316 U. S. 455, it was the judge's duty to protect the interests of the defendant. Thus Blackstone noted, while discussing arraignment and pleas, that "the judges of the court * * * are to be of counsel for the prisoner, and to see that he hath law and justice." 4 Bl. Comm. *324; see also 1 Cooley's Const. Lim. (8th ed.), 698 *et seq.* *Betts* v. *Brady* permitted Maryland to follow this procedure in a case which raised a simple question of fact, but the Court was careful to point out that the Maryland judges were solicitous for the interests of defendants who lacked counsel and would make an appointment if serious disadvantage appeared (pp. 472-473). In several recent cases the opinions of the Court have continued to emphasize the critical character of the trial judge's conduct. *Uveges* v. *Pennsylvania*, 335 U. S. 437, 442; *Gibbs* v. *Burke*, 337 U. S. 773, 781.

The cited cases involved trials after a plea of not guilty, where the need for counsel may be greater than on a plea of guilty. Modern penology emphasizes, however, the importance of the sentence. In many respects this aspect of a criminal case places a greater burden on the court than issues of fact. The court's discretion is broader. It must suit the punishment to the defendant. The information which may be submitted is not subject to the safeguards of truth and accuracy that attend the introduction of evidence. The presence of counsel, while not indispensable, is calculated to develop an accurate understanding of the relevant facts and a measure of conscientious deliberation on the

appropriate sentence. Compare *Carter* v. *Illinois*, 329 U. S. 173, 178; *Von Moltke* v. *Gillies*, 332 U. S. 708, 721. Counsel may insist upon careful, judicial consideration and if that is denied, secure correction elsewhere. For this reason the Fourteenth Amendment guarantees a defendant the opportunity to have legal assistance, whether he pleads guilty or elects to stand trial, whenever the conduct of the trial court or prosecuting officials is such that proceeding without counsel is so apt to result in injustice as to be fundamentally unfair. *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441.

The record of mistakes and facetious indifference on the part of the sentencing court fairly demonstrates the likelihood of injustice. Petitioners neither had nor waived counsel. Therefore, they were convicted without due process of law.

Conclusion

The judgments of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted,

ARCHIBALD COX,
Counsel for Petitioners.

October, 1951.